Supreme Court, U.S.
FILED
NOV 13 2001
CLERK

No. 01-499

In The

Supreme Court of the United States

ROBERT BROWN,

Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

(1) The first question presented by this case is whether preclusion is warranted under the Railway Labor Act whenever a collective bargaining agreement ("CBA") might provide the employer with a defense to a statutory claim, or whether preclusion more narrowly is appropriate only where the right asserted by the plaintiff was itself created by the CBA.

Respondent appears to assert that these two very different standards are somehow the same. (Br. Opp. 14-15). The distinction between a cause of action and an affirmative defense is a fundamental one. Respondent's contention to the contrary is neither explained nor explicable.

The petition describes decisions in the Second, Eighth, Ninth and Tenth Circuits which limit preclusion to instances in which the CBA, not a federal statute, is the source of a plaintiff's rights. (Petition, pp. 9-13). Respondent asserts repeatedly that these decisions instead held that a statutory claim can proceed only "where there is no apparent dispute as to the interpretation of the CBA." (Br. Opp. 15-16). The actual holdings of these decisions, quoted in the petition, are to the contrary.

We noted in the petition that this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), contains not only several passages limiting preemption to cases in which the plaintiff's claim arose from the CBA itself (Petition p. 19 n. 20), but also other quite different sentences suggesting that preemption would apply, far more broadly, whenever any interpretation of a CBA might be required. (Petition p. 20 n. 21). Respondent quotes one of the latter passages to support its contention that the decision of the Seventh Circuit is consistent with the decisions of this Court. (R.Br. 9). Other portions of *Hawaiian Airlines*, however, could be, and regularly are, cited in lower court opinions which, unlike the Seventh Circuit, limit preclusion to cases in which the claim itself arises from a CBA. At this juncture in the development of

RLA jurisprudence, *Hawaiian Airlines* is not the solution, it is a principal source of the problem.

(2) We explained in the petition that under the decision of the court of appeals it would be virtually impossible to enforce the reasonable accommodation provisions of the Americans With Disabilities Act against an employer subject to the Railway Labor Act. (Petition, pp. 7-9, 20). This de facto exemption from the ADA includes not only the nation's airlines and railroads, but also a variety of other firms which service those industries and are thus subject to the RLA.[1]

The decision below is now applied in the Seventh Circuit to bar claims of intentional discrimination under other statutes. E.g., *Tice v. American Airlines, Inc.*, 2001 WL 1000723 (N.D.Ill. 2001) (*Brown* bars claim of intentional discrimination under the Age Discrimination in Employment Act.)

Respondent contends that under the Seventh Circuit decision there are several circumstances in which it still might be possible to bring an ADA accommodation claim. On even cursory inspection, however, it is clear that these possibilities are illusory.

First, Respondent asserts that the decision below would only bar ADA reasonable accommodation claims in those cases in which a plaintiff asserted that the accommodation in question would not violate a seniority system. (Br. Opp. 12). But in the Seventh Circuit every plaintiff *must* make just that assertion in light of *Eckles v. Consolidated Rail Corp.*, 94 F. 3d 1041 (7th Cir. 1996), or his or her claim will face dismissal.

Second, Respondent insists that an ADA accommodation claim will survive if an employer chooses to agree with a plaintiff's assertion that the accommodation will not violate seniority rules. (Br. Opp. 12). But the decision

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[1] See, e.g., *Sky Chefs, Inc.*, 15 NMB 397 (1988); *Sky Cap, Inc.*, 13 NMB 292 (1986); *International Total Services/Services & Systems, Ltd.*, 9 NMB 392 (1982).

of the Seventh Circuit assures that no employer will do so. Under the decision below an employer can always obtain dismissal of such an ADA claim simply by asserting a pro forma disagreement with the plaintiff's interpretation of the seniority rules. In the face of such a disagreement, the court is required to dismiss the ADA claim, without inquiring into the merits or good faith of the employer's position. Under the decision below it would be virtual malpractice for an employer's lawyer to fail to disagree with a plaintiff's interpretation of the seniority rules.

Third, Respondent insists that the decision below permits an ADA plaintiff to "sta[y] his ADA claim until he can establish his interpretation of a CBA in the appropriate arbitral forum." (Br. Opp. 13; see *id.* at 7). But Respondent does not dispute our contention that it is in fact impossible to obtain from the Public Law Board a determination of this sort. (Petition, pp. 5, 8-9). The Board can only resolve grievances arising under the CBA, not possible CBA-based defenses to lawsuits arising under federal statutes; in cases such as this the CBA is only the basis of a proffered defense, not of the claim itself. In this very case the Respondent persuaded the Board to refuse to resolve the instant controversy. (Respondent's Appendix, p. 6). Thus any stay of the sort proposed by Respondent would be permanent, preventing enforcement of the ADA as surely as would an outright dismissal.

(3) Respondent predicts that in *U.S. Airways, Inc. v. Barnett*, No. 00-1250, the Court will decide only whether a seniority system *not* contained in a CBA constitutes a defense to an ADA reasonable accommodation claim. (Br. Opp. 19-20). As we noted in our petition, however, both parties in *U.S. Airways* are advancing arguments which would be equally applicable to seniority rules contained in a CBA. (Petition, pp. 23-24). The reply brief recently filed by the petitioner in *U.S. Airways* continues to insist that the same legal standard should apply under the ADA regardless of whether or not the seniority system is

contained in a CBA, and the petitioner again expressly relies on the Seventh Circuit decision in *Eckles v. Consolidated Rail Corp.*, 94 F. 3d 1041 (7th Cir. 1996), which was applied by the court below in the instant case. (Reply Brief for Petitioner, No. 00-1250, pp. 17-20). *U.S. Airways* is scheduled for argument on December 4, 2001.

In the event that this Court's ultimate decision in *U.S. Airways* does not resolve this question, certiorari should be granted in the instant case to decide if a seniority rule contained in a CBA constitutes a bar to an ADA reasonable accommodation claim. The courts of appeals are not, as Respondent suggests, in agreement about the significance of such seniority rules. Decisions in several circuits, for example, will recognize such a defense only if the express terms of the CBA unambiguously bar the accommodation in question, a stringent standard not met here or in many other cases. E.g., *Willis v. Pacific Maritime Ass'n*, 244 F. 3d 675, 684 (9th Cir. 2001) (en banc); *Aka v. Washington Hosp. Center*, 156 F. 3d 1284, 1302 (D.C.Cir. 1998) (en banc).

Whether a CBA can exempt an employer from its otherwise mandatory obligations under the ADA is a matter of compelling importance; that issue should be determined by this Court in the instant case if the disposition of *U.S. Airways* leaves the matter unresolved. The EEOC construes its ADA regulations to provide that the terms of a CBA cannot alter an employer's statutory obligations.

> [A]n employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement.

29 C.F.R. pt. 1630 App., Section 1630.6. The EEOC has insisted in the lower courts that seniority rules cannot create a defense to an ADA accommodation claim. The petitioner in *U.S. Airways* has emphasized that in that case "[t]he EEOC has not filed a brief in this Court . . .

defending its position below." (Reply Brief for Petitioner, No. 00-1250, p. 1). In litigation in this Court, however, the decision whether to defend a longstanding EEOC position on this (or any other) issue is made by the Solicitor General, not by the EEOC itself. If the EEOC's interpretation of the ADA is to be rejected, that should be on the basis of an informed decision by this Court, and should not occur simply because the Solicitor General in *U.S. Airways* opted not to present the Commission's construction of the law.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the decision of the Seventh Circuit.

Respectfully submitted,

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